Supreme Court, U.S.
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No. 02-___

In The

Supreme Court of the United States

TAWOOS BAZARGANI, M.D.,

Petitioner,

v.

AIDAN ALTENOR Ph.D and MIA MARCOVICI, M.D. and HAVERFORD STATE HOSPITAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

1. Whether the opinion below departed from the accepted and usual course of judicial proceedings and therefore necessitated the United States Supreme Court's supervision because its ruling conflicts with this court's prior rulings upon the fraud on the court, and because such a fraud has deprived the litigant from her due process right to a fair, impartial trial where the litigant's complaint against the litigant's employers' discriminatory and retaliatory behavior directed toward the litigant's class of the religion can be decided to its merits.

2. Whether the opinion below departed from the accepted and usual course of judicial proceedings because its rulings conflicts with other appellate courts' as well as with this court's prior rulings that pursuant to Federal Rule of Civil Procedure 41.34[6][g] a stipulated dismissal without prejudice deprives the courts from jurisdiction to issue any further order. And because the litigant was entitled to a dismissal as of right without prejudice which was mutually agreed and documented, therefore, the District Judge's order to dismiss the action of the claim was in violation of the litigant's due process right and therefore was void.

3. Whether the opinion below departed from the accepted and usual course of proceedings because its ruling conflicts with other appellate courts' as well as with this court's prior rulings because the litigant was entitled to relief from the order because of extraordinary circumstances. Pursuant to Federal Rule of Civil Procedure 60.48[3][b] such a circumstance does exist when the litigant lacks any fault in not preventing the order from what the relief is sought, which explains in full the litigant's circumstances in the instant case.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The court of appeals entered its judgment on November 7, 2002, for the case No. 01-4315 and the Order of District Judge and the opinion of the case are attached and the deadline date for filing the petition for the writ of certiorari is February 5, 2003.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 7, 2002. The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure ("F.R. Civ. P") 510.24[1][a] & 510.24[1][b] & 510.24[1][b][i] governs the United States Supreme Court's supervisory power assuring that circuit courts remain within accepted boundaries (these rules are reprinted in the Appendix C as they are documented).

The following F.R. Civ. P. governs the fraud on the court, 60.21[4][6] & 60.21[4][g] & 60.22[2] and 60.22[3][a] where it defines the participation of the attorney upon the fraud on the court as the fundamental factor of such a fraud and sets no time limit for relief from the order procured by the fraud and limits the discretion upon the decision for relief to a sound legal discretion guided by

accepted legal principles, specifically, the relief is favored so that the claim can be determined on its merits.

United States Constitution, Amendment XIV, Section 1, notes 889 & 912 govern the conditions under which a hearing can be held and note 1040 rules as follows: "When state provided means of appeal it can not put limitations on it which are discriminatory, arbitrary."

F.R. Civ. P. 41.33[6][e] and 41.34[2] specifically rule about a litigant's right to withdraw the action of the claim as of right and therefore void the court from jurisdiction to issue any order. Rule 41.40[1] specifies that Rule 41(a)(2) can only be applied when dismissal is no longer available as of right.

F.R. Civ. P. 60.48[3][b] and 60.48[4] define and limit the extraordinary circumstance which is totally identical to the litigant's circumstances in the instant case.

United States Code Annotated Title 18 Section 1623(a) which is parallel to Pennsylvania Consolidated Statutes Annotated, title 18 section 4904(a)(1) defines the criminal nature of the perjury under oath and limits the penalties. *U.S. v. Sarafini*, 233 F.3d 1149 (Pa.2000).

All above documented laws and rules in this section are reprinted in Appendix C as they are originally documented.

STATEMENT OF THE CASE

A - PROCEDURAL HISTORY

The petitioner ("the Doctor") despite the physician's union agreement (PASMHP), provision regarding seniority,

and despite the defendants' its own routine in promoting the most senior psychiatrist, has been passed over for promotion, as the most senior psychiatrist, twice, first in 1992 and then in 1994. In 1992, when there was not a single ill report about the Doctor's patient care a physician with much less seniority and just employed (Dr. Lyudmila Glazman) was promoted (Dr. Glazman belonged to the same religious, ethnic group as of Dr. M. Marcovici, assistant superintendent for clinical services, who had been conducting the promotion matter) (see attached Lodging P. 17-22). Consequently in June 1993 the Doctor because of the defendants' ongoing discriminatory behavior against the Doctor filed a Title VII complaint in Philadelphia Equal Employment Opportunity Commission ("E.E.O.C.") (see Lodging, P. 16) after she failed to solve the promotion problems locally. The defendants retaliated against by assigning the Doctor to work with the sickest patients and Dr. Glazman, recently employed and promoted physician, was assigned to supervise the Doctor. In 1994 the Doctor was passed over for promotion for the second time when the promotion process was repeated for the same position. First the promotion processed in June when the Doctor could not apply because of the defendants' noncompliance with the posting policy then the defendants as its very routine simply decided to promote the second most senior psychiatrist (Dr. S. Sakheran) and did not believed that Dr. Zarine Fernandes is over qualified to Dr. Sakheran. But the promotion process had to be repeated because of the defendants' noncompliance with posting policy. Therefore, the position was posted for applicants in October 1994 when the doctor also applied but parallel to this application an allegation, for the first time in the Doctor's working history, was written by Dr. Glazman, the Doctor's new supervisor, against the

Doctor's patient care (see the exhibits from the instant brief, attached Lodging P. 23-25). Then in October 1994, the defendants showed astonishing contradiction as well as inconsistency both in its approach and reasoning for promotion and believed that Dr. Z. Fernandes is over qualified both to Dr. S. Sakheran as well as to Dr. Bazargani (the Doctor). On November 21, 1994, the Doctor filed and served Title VII complaint in federal court (certified record of this complaint is attached, see Lodging P. 1-12). Three days past filing, on November 23, 1994, the Doctor's employment was suspended because of allegation and because of being delusional, without legally required mental examination to substantiate such a grave diagnosis (the Doctor following five (5) minutes conversation with an ex-colleague was accused of being delusional) while Dr. Mia Marcovici as a psychiatrist has been fully aware that a five (5) minutes casual conversation do not meet the requirement for such a diagnosis by any standard, the Doctor has never had a history of mental disorder or mental treatment when ever what ever. On November 30, 1994, the Doctor following an official mental examination, which declared the Doctor to be free of any mental disorder returned to duty (see Lodging, P. 26-31), and the same day Dr. Z. Fernandes was promoted to the posted position (see Lodging, P. 38). The Doctor resumed her previous duty and functioned very much as routine without any event or incidence of any kind until the second suspension. The cause for second suspension, despite the official mental examination reported nine (9) days before the second suspension, which declared the Doctor free of any mental disorder, was again insanity and allegation, the Doctor was accused of being dangerous to self and others. A person being dangerous to self and others because of

insanity is legally mandated to be immediately, involuntarily admitted in to a mental facility, but not surprisingly, Dr. M. Marcovici, psychiatrist, took no action to protect the Doctor and her patients from danger and four (4) weeks past the filing Title VII complaint the Doctor's employment was terminated after seventeen years dedicated service (see Lodging, P. 34-37). In termination letter the Doctor was accused about the treatment of four (4) of her patients. Although prior to termination two pre-disciplinary conferences were held to discuss the charges written in allegations but the Doctor's attorney was banned to join the conference despite the Doctor's legal entitlement, this legal entitlement was verified with the physician's union's attorney before to hire the attorney. The Doctor sufficiently defended herself by substantiating the facts that the Doctor's patient's treatment had been supervised by Dr. Glazman and the fact that the implemented treatment remained within the defendants' policies and procedures. In January 1995, the Doctor appealed both her termination and her non selection for promotion. Two days hearing was held for termination during which the defendants paid two private psychiatrists who argued the Doctor's patient care independent of the defendants' policies and procedures and the Doctor's defenses argued during the pre-disciplinary conferences has never been rebutted. The charges for two out of four patients were dismissed because the defendants could not substantiate the causes for its accusations [see 90 F. Supp. 2d 643 (E.D. Pa. 2000), District Judge's Memo, P. 8] and for the charges of two other patients, which was the treatment with the medicine "Lithium," the defendants could only prevail by committing perjury while under oath consequently a perjury and forgery charge was filed against the Doctor's supervisor in Philadelphia District

Attorney Office (see Lodging, P. 67-77) (*Bazargani v. Glazman*). The complaint for non selection for promotion which was filed in State Civil Service Commission ("S.C.S.C.") was scheduled for a hearing on May 4, 2000, when the Doctor requested for continuation of the hearing, the commissioner while in violation of due process law, ignored the Doctor's request and held a hearing and dismissed the complaint in the absence of the Doctor before to inform the Doctor that her request for continuation was denied (see Lodging P. 39 & 58-60) (for detail about the reason for continuation of the hearing see below the Statement of Facts). The Doctor unsuccessfully appealed this dismissal and immediately after the Doctor's final appeal was denied, the Doctor motioned to reopen the first Title VII complaint which was dismissed previously (the instant case). The second Title VII claim was dismissed following defendants' summary judgment in March 2000, before the Doctor's claim for non selection for promotion, which was one of the main causes of action, to be heard (see Lodging p. 66). Action of the first Title VII lawsuit, filed on November 21, 1994, was mutually agreed to be dismissed as of right after the second Title VII claim was filed by a firm specialist in E.E.O. litigation. Therefore, next to the status conference on April 1995, no action was taken by either party, consequently the case had not proceeded to trial, the attached docket entry, an exhibit from the instant brief, proves this claim (see Lodging P. 13-15), on September 26, 1995, the Doctor's then-attorney provided the Doctor with a copy of agreement of dismissal as of right pursuant to Fed. R. Civ. P. Rule 41(a)(1)(ii) (see Lodging, P. 12). Astonishingly, on September 28, 1995, attorneys of both parties hand in hand with the defendants, in a hearing in the chamber of the District Judge, in the absence of the Doctor and absolutely out of the

Doctor's awareness, while under the oath, they did not say the truth that, the case had not been proceeded to the trial, while under the oath, they did not say the truth that there was a mutual agreement to withdraw the action under Rule 41(a)(1)(ii), while under the oath they pretended their readiness to select the jury which was nothing but a facade and they withdrew the action of the case under Rule 41(a)(2). These claims are documented in the District Justice's Order (see the copy of the certified record of this order Lodging, p. 2). The Doctor discovered this fraud on the court in the year 2001, when the Doctor was preparing a brief, as a pro se, for the second Title VII claim. Therefore the Doctor motioned to reopen the first Title VII claim in October 2001 (the instant case), immediately after the final appeal for non selection for promotion which was one of the main causes of action, and was dismissed by commissioner in the absence of the Doctor was denied. The District Judge denied the motion. The denial was appealed to the Third Circuit, which after it reviewed the briefs without having any oral argument, denied the appeal and the instant petition for certiorari followed. The above Procedural History is a print of unopposed history of the events of this claim which is self explanatory and speaks for itself.

B – STATEMENT OF FACTS

The facts related to the Doctor's non-selection for promotion in 1992 till December 1994 when the Doctor was dismissed from her position are documented in the above Procedural History with the related references to the evidence (see Procedural History).

In January 1995 the Doctor appealed her non-selection to promotion to the State Civil Service Commission ("S.C.S.C."). This hearing for seven (7) times mainly upon the request of the defendants were continued (see Lodging P. 39 & 58 and 60). In April 2000 the Doctor motioned for examination of the Doctor's violated rights, for the cause of this motion see the copy of the motion (see Lodging, P. 61-64 and the related evidences, P. 45-60). The commission denied the motion (see Lodging, P. 65). On May 2, 2000, the Doctor through her letter which was mailed express with noon delivery informed the commissioner that her Order denying the Doctor's motion for examination of the Doctor's rights was being appealed, therefore requested for the continuation of the hearing for non-selection for promotion which was scheduled on May 4, 2000, (see Lodging 43-44 & 42). The commissioner ignored the appeal and held a hearing before to inform the Doctor that her request for continuation of the hearing was denied and dismissed the Doctor's complaint for non-selection for promotion in the absence of the Doctor on May 4, 2000, then sent a letter to the Doctor May 4, 2000 (post marked PM) where she denied the Doctor's request for continuation which was received by the Doctor two (2) days past the hearing (see Lodging 40-41).

REASONS FOR GRANTING THE WRIT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS UPON THE FRAUD ON THE COURT AND BECAUSE SUCH A FRAUD HAS DEPRIVED THE LITIGANT FROM HER DUE PROCESS RIGHT TO AN IMPARTIAL FAIR TRIAL THEREFORE CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS LAW.

1. The United States Supreme Court Rule 10, in considerations governing the review of certiorari Federal Rule of Civil Procedure ("F.R. Civ. P.") 510.24 defines the following: "Departure From Usual Course of Judicial Proceedings" and F.R.Civ. P. 510.24[1][a] rules as follow: "In ruling on a petition for certiorari, the Court may consider whether" a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power;" "This old and well-established provision . . . apparently reflects the Supreme Court's position at the apex of the federal judicial system." F.R. Civ. P. 510.24[1][b] defines the Court's supervisory task and F.R. Civ. P. 510.24[1][b][i] rules as follows: "Assuring That Circuit Courts Remain Within Accepted Boundaries" and it further documents that: "the Court is vested with various supervisory tasks . . . Supreme Court Rule 10 recognizes an additional responsibility – to ensure that the circuit courts stay within the boundaries of "the accepted and usual course of judicial proceedings." If a circuit court has strayed too far from this course, the Supreme Court

may grant certiorari to correct the situation." See *Frankfurter and Hart*, 48 Harv. L. Rev. 238, 270 n. 78 (1934).

2. On November 21, 1994, the Doctor filed and served the same day the first discrimination and retaliation complaint against her then-employer ("defendants"). After the Doctor's second discrimination and retaliation complaint was filed by a firm with specialty in Equal Employment Opportunity litigation ("E.E.O.") both parties mutually agreed to withdrew the actions of the first discrimination and retaliation complaint as of right with stipulation pursuant to F.R. Civ. P. 41(1)(a)(ii). Consequently following the status conference of this complaint no actions were taken, whatsoever, by either party, therefore, the complaint was not proceeded to the trial, the docket entry (an Exhibit from the instant brief) proves this claim (see Lodging, P. 13-15). On September 26, 1994, the Doctor's then-attorney provided the Doctor with a copy of the agreement to withdraw the action as of right with stipulation, the copy of the agreement is attached (see Lodging, P. 12) (for detailed documentation, exhibits and proves see the above procedural History). Astonishingly on September 28, 1995, the attorneys of both parties hand in hand with the defendants, in the absence of the Doctor and absolutely out of the Doctor's awareness, appeared in a hearing in the District Judge's chamber and while under the oath they did not say the truth about both parties agreement to withdraw the action of the claim as of right, while under oath they did not say the truth that the case was not proceeded to the trial and while pretending their readiness to select the jury which was nothing but a facade they withdrew the action of the case pursuant to F.R. Civ. P. 41(a)(2) these facts are documented in the

District Judge's Order, a certified copy of this Order is attached (see Lodging, P. 2).

3. The following is this Court's prior ruling in relieving the judgment because of the fraud on the court, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 240-244, "tampering with the administration of justice . . . is a wrong against institutions set up to protect and safeguard the public, institutions in which fraud cannot be complacently tolerated." F.R. Civ. P. 60.21[4][b] defines the fraud on the court as follows: "Misconduct by Officer of Court Is Persuasive Factor in Fraud on Court," the following is a definition quoted by Sixth Circuit about the fraud on court and includes the following elements: (1) conduct on the part of an officer of the court; (2) that is directed to the "judicial machinery" itself; (3) that is intentionally false, willfully blind to the truth, or is in reckless disregard of truth or falsity; (4) that is a positive averment or is a concealment when one is under a duty to disclose; and (5) that deceives the court. Thus misconduct of an officer of the court is an essential element of fraud on the court," see *Demjanjuk v. Petrovsky,* 10 F.3d 338, 348 (6th Cir. 1993); see *Cleveland Demolition Co. v. Azcon Scrap Corp.,* 827 F.2d 984, 987 (4th Cir. 1982); see *U.S. v. Sarafini*, 233 F.3d 1149 (Pa. 2000) where it documents as follows: "making false declaration consist of testimony which is (1) given under oath (2) false in one or more respects, (3) knowingly and willfully given and (4) material;" see *U.S. v. Weller,* 238 F.3d 1215 (Kan. 2001). In relieving the order because of the fraud on court F.R. Civ. P. 60.21[4][g] rules as follows: "No Time Limit or Laches Applies to Relief Based on Fraud on Court" and it further documents that: "Because fraud on the court concerns the integrity of the judicial process itself, a judgment may be

set aside for fraud on the court at any time. There is no time limit on any party or court. After all in the leading *Hazel-Atlas* case, the United State Supreme Court acted in 1944 to tell the Third Circuit that it should set aside its 1932 judgment because it was procured by fraud on the court (twelve (12) years past the judgment)." See *Root Refining Co. v. Universal Oil Products Co.,* 169 F.2d 514, 522 (3d Cir. 1948) it states that "the general rule that courts do not set aside their judgment after the term at which they were rendered has no application" F.R. Civ. P. 60.22[2] defines the court's discretion in relieving the order as follows: "The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles," see *Assman v. Fleming,* 159 F.2d 332, 336 (8th Cir. 1947).

Consequently, the opinion below departed from usual course of judicial proceeding, after reviewing the brief without having an oral argument, by merely overlooking the fraud on the court and pretending that the fraud has not been committed (see App. A, P. 3). Even though, it has been honored with the responsibility of being "the gate keeper" in protecting the society through the implementation of the legal rules, policies and procedures. Consequently, the opinion below has been in total conflict with the other circuits as well as with this court's prior rulings upon the fraud on the court.

4. As it has been detailed in the above Statement of Facts and Procedural History which has been supported by the attached evidences, the State Civil Service Commission ("S.C.S.C."), while in violation of the Doctor's due process rights, has dismissed the Doctor's claim for non selection for promotion in the absence of the Doctor. This claim has been one of the major causes for the Doctor's

Title VII claim and the result of this claim will make substantial changes in the Doctor's pension plan. The defendants' discriminatory behavior, involving the Doctor's promotion which has been detailed in the above unopposed Procedural History which is self explanatory and speaks for itself, as well as the defendants some other discriminatory behavior unrelated to the Doctor's dismissal from her position have never been heard before any tribunal, the relief of the order of the instant case will establish the Doctor's due process right to an impartial, fair trial where these claims can be determined on their merits. F.R. Civ. P. 60.22[3] documents as follows: "Relief Favored When Judgment Has Resulted From Default;" F.R. Civ. P. 60.22[3][a] documents as follow: "if a party has a meritorious claim or defense . . . a court should resolve all doubts in favor of granting relief so that the matter may be determined on its merits." See *Feliciano v. Relian Tool Co., Ltd.,* 691 F.2d 653, 656 (3d Cir. 1982); See *Davis v. Musler,* 713 F.2d 907, 912-913, 916 (2d Cir. 1983) where it states as follows: "This court has never hesitated to reserve the denial of a motion to vacate a default judgment where further factfinding were necessary to ensure the substantial justice was served;" See *United Coin Meter Co., Inc., v. Seaboard Coastline Railroad,* 705 F.2d 839, 846 (6th Cir. 1983) which states as follows: "Trials on the merits are favored in federal courts and a "glaring abuse" of discretion is not required for reversal of a court's refusal to relief a party of the harsh sanction of default."

Consequently, the opinion below by denying to relieve the order conflicts with other circuits as well as with this court's prior rulings on the essential due process rights of a litigant to an impartial, fair trial. The intervention of this court becomes important because it will establish the

essential due process right of a litigant to an impartial fair trial where claims about the employer's discriminatory and retaliatory behavior against a certain class of religion can be decided on its merits.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OTHER APPELLATE COURTS AND WITH THE THIRD CIRCUIT'S OWN PRIOR RULINGS AS WELL AS WITH THIS COURT'S PRIOR RULINGS THAT A LITIGANT IS ENTITLED TO WITHDRAW THE ACTION OF A COMPLAINT AS OF RIGHT WITHOUT PREJUDICE AND THAT STIPULATED DISMISSAL WITHOUT PREJUDICE DEPRIVES THE COURT OF JURISDICTION TO ISSUE ANY FURTHER ORDER

As it has been clearly documented in the Doctor's then-attorney's Letter dated September 26, 1995 (see Lodging P. 12), the Doctor has only authorized her then-attorney to withdraw the action of the claim, as it has been mutually agreed, as of right with stipulation pursuant to F.R. Civ. P. 41(a)(1)(ii). On September 28, 1995, the attorneys of both parties hand in hand with defendants, despite such an agreement, committed a fraud on the court (as it has been documented in detail in the above section 1), in order to withdraw the action pursuant to F.R. Civ. P. 41(a)(2), in the absence of the Doctor and absolutely out of the Doctor's awareness. Therefore the agreement to withdraw as of right remained fully in effect when they committed the fraud on the court and withdrew the action of the claim pursuant to Rule 41(a)(2). Consequently District Judge's Order pursuant to F.R. Civ. P.

41(a)(2) was in direct conflict with the following F.R. Civ. P. 41.33[6][e] which defines as follows: "Dismissal by Notice without prejudice Deprives Court of Jurisdiction to Consider Merits of Action or Issue Further Orders" further it states that: "A court order dismissing an action 'without prejudice' following a dismissal by notice is superfluous", see *Manze v. State Farm Ins. Co.,* 817 F.2d 1062, 1065-1066 (3d Cir. 1987) where the Third Circuit documents: "The court may not decide to dismiss" and further it documents "vacating district court's dismissal with prejudice on bad faith claim against insurer" see *Safeguard Business Sys. Inc. v. Hoeffel,* 907 F.2d 861, 864 (8th Cir. 1990) where it documents: "judgments and orders denying injunctive relief and dismissing one count of the complaint reversed as void, even though district court had declared they were effective, nunc pro tunc to date preceding filing of notice of dismissal." Furthermore the District Judge's Order pursuant to F.R. Civ. P. 41(a)(2) was in conflict with the following F.R. Civ. P. 41.3[2] which documents as follows: "the parties' right to terminate the action by stipulation is absolute . . . and a court can not order a party to execute a stipulation of dismissal even if the other party claims that the parties agreed to settle the matter," *In re Wolf*, 842 F.2d 464, 466 (D.C. Cir. 1988) where documents: "vacating district court's order altering stipulation;" see *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989) it documents that: "[a] voluntary dismissal by stipulation under Rule 41(a)(1)(ii) is as of right." The District Judge's Order pursuant to 41(a)(2) was also in direct conflict with F.R. Civ. P. 41.40[1] which limits the voluntary dismissal with court order as follows: "Rule 41(a)(2) permits the plaintiff to seek a voluntary dismissal by court order if such a dismissal is no longer available as of right", see *Total Containment, Inc. v. Aveda Mfg. Corp.,*

18 Fed. R. Serv. 3d (Callaghan) 835 (E.D. Pa. 1990) where the third Circuit documents that: "[t]he general purpose of voluntary dismissal under Rule 41(a)(2) is to permit the plaintiff to take a voluntary nonsuit and start over . . . ;" see *Holbrook v. Anderson Corp.,* 130 F.R.D. 516, 519 (D. Me. 1990). In defining the void judgment F.R. Civ. P. 66.44[4] documents as follows: "Judgment May Be Void for Violation of Due Process by Rendering Court," further it documents as follows: "There is no theoretical limit to the possibilities that a judgment could be void because a court with jurisdiction over the subject matter and jurisdiction over the parties nonetheless has acted in a manner inconsistent with due process of law." The District Judge's Order pursuant to F.R. Civ. P. 41(a)(2) deprives the Doctor of her due process right which entitles the Doctor of a dismissal as of right with stipulation, and, therefore was in violation of due process law, see *Carter v. Fenner,* 136 F.3d 1000, 1006-1009 (5th Cir. 1998) which documents: "due process violation occurs when parties' failure to follow relevant law or procedure undermines validity of judgment." In the case, *Simer v. Rios*, 661 F.2d 655, 663 & n.18 (7th Cir. 1981) documents as follows: "Court states that violation of due process may make judgment void," further adds: "failure to give proper notice to class members." F.R. Civ. P. 60.44[5][c] documents as follows: "No Real Time Limit on Relief;" "There is no real time limit of any kind on a motion for relief from a void judgment. A motion under Rule 60(b)(4) challenging a judgment as void is subject neither to the 'reasonable' time requirement . . . but rather may be made at any time." See *Bludworth Bond Shipyard v. M/V Carribean Wind*, 841 F.2d 646, 649 & n.6 (1988) (citing Moore's for proposition that laches "cannot cure a void judgment"); See *Land Serv., Inc. v. Ceramica Europa II, Inc.,* 160 F.3d 849, 852 (1st Cir. 1998)

where it documents: "Relief from void judgment may be had at any time, regardless of 'reasonable' time limit or doctrine of laches ('if judgment is void for lack of personal jurisdiction, Rule 60(b)(4) motion to set aside judgment may be made at any time, and district court does not have discretion to deny such motion')." *Meadow v. Dominican Republic,* 817 F.2d 517, 521 (9th Cir. 1987) ("There is no time limit on a Rule 60(b)(4) motion to set aside a judgment as void"). F.R. Civ. P. 60.68[4] documents as follows: "Either a judgment is void, or it is not. There is no discretion involved at all . . . Therefore a district court's decision . . . under Rule 60(b)(4) is not reviewed on an abuse of discretion standard, although courts frequently state that an erroneous determination of the question is a *per se* abuse of discretion."

The panel's opinion, in reference to void judgment, has strictly limited its argument, to the lack of jurisdiction over the parties and lack of jurisdiction over the subject matter where the Doctor had no disagreement with the defendants (see App. A, p. 3) and by such a limitation it has been in gross negligence of all those federal rules documented above in this paragraph, therefore, it has deviated from the usual course of judicial proceedings in implementing the rules. Given the inconsistency with the uniform decisions of other courts of appeal as well as the Third Circuit's its own prior rulings, the Third Circuit's analysis of the instant case has been inexplicable.

III

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS AS WELL AS WITH THE RULINGS OF OTHER COURTS OF APPEALS THAT A LITIGANT IS ENTITLED TO RELIEF FROM A FINAL ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6) BECAUSE THE LITIGANT'S REASONS JUSTIFYING THE RELIEF AMOUNT TO "EXTRAORDINARY CIRCUMSTANCES"

F.R. Civ. P. 60.48[3][b] documents as follows: "Extraordinary Circumstances Usually Means Lack of Fault by Movant" and it further states that: "The cases seem to make that fault/no fault distinction the controlling factor in determining whether extraordinary circumstances will be found or not. In a vast majority of the cases finding that extraordinary circumstances do exist so as to justify relief, the movant is completely without fault for his or her predicament; that is, the movant was almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought. For example: there should be relief from judgment that were taken without any real knowledge of the proceedings by the movant." See *National Credit Union Administration v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) where it documents that: "Relief proper when judgment rendered without knowledge of movant and movant's lack of knowledge was not his fault"; See *Ervin v. Wilkinson*, 701 F.2d 59, 61-62 (7th Cir. 1983) where it documents as follows: "Litigant deprived of day in court by means of fraud could have relief." F.R. Civ. P. 60.48[4][a] defines as follows: "Culpable Conduct by Party's Agent and Attorneys Might Support Relief"; See *Resolution Trust Corp. v. Forest Grove,*

Inc., 33 F.3d 284, 293-294 (3rd Cir. 1994) where it documents that: "Judgment by confession denied the movant due process when confession made by attorney-in-fact who lacked authority."

The Doctor's circumstances were extraordinary because as it has been documented with the evidences in the above (see Reasons for Granting The Petition, section I).

The fraud on the court on September 28, 1995, had been committed by the attorneys of both parties hand in hand with the defendants in the absence of the Doctor and absolutely out of the Doctor's awareness when the action of the instant complaint had been dismissed pursuant to F.R. Civ. P. 41(a)(2) which the Doctor neither agreed nor authorized her then-attorney to take such an action on the Doctor's behalf (see Lodging P. 2 & 12).

1. The Doctor discovered the fraud on the court in the year 2001 when the Doctor had been preparing a brief as a pro se for her second title VII complaint which was dismissed following the defendants' summary judgment without having a hearing for the Doctor's discrimination claim because of non-selection for promotion (for documentation see above Procedural History and the Statement of Facts), and the Doctor was not negligent because of not predicting the fraud on the court because the Doctor had full trust in the judiciary system, and because such a trust in judiciary system is not in violation of any rules or regulation set by the judiciary system itself, therefore the Doctor should not be penalized for such a trust.

2. The Doctor was very reasonable in time to file the motion for the relief of dismissal order of the first Title VII claim in October 2001, immediately after the Doctor's final

appeal for having a hearing for the non-selection for promotion complaint was denied. The non selection for promotion complaint which has been one of the main causes of action for filing a discrimination claim has never been heard before any tribunal, and it was dismissed by S.C.S.C. in the absence of the Doctor.

Consequently the opinion below has departed from the usual course of judicial proceedings by denying the relief for the dismissal order because of the Doctor's extraordinary circumstances (see Appendix A, p. 3-4) and by such a denial has deprived the Doctor from the Doctor's due process right to an impartial, fair trial where the Doctor's employers' discriminatory and retaliatory behavior in relation to the doctor's non-selection for promotion and other discriminatory behavior non related to the Doctor's termination and termination can be decided to its merits. This order has never been dismissed before and has been a final order.

CONCLUSION

This case presents a question of exceptional importance whether a litigant is entitled to relief from an order pursuant to F.R. Civ. P. 60(b) because such a relief will establish the litigant's due process rights to an impartial, fair trial, where the litigant's complaint against the employers' discriminatory and retaliatory behavior, directed toward the litigant's class of religion can be decided to its merits. By granting this petition for certiorari this court will correct the lower courts' erroneous determination which pursuant to F.R. Civ. P. 60.68[4] is *per se* the abuse of discretion, in denying the relief for the

order by questioning the reasonable time for relief, while F.R. Civ. P. 60.21[4][g] and 60.44[5][e] patently rule that, there is no time limit or laches for relief from the order, which has been procured by fraud on the court or where the order is void, or by denying the relief of the order pursuant to F.R. Civ. P. 60(b)(6) because of an extraordinary circumstance while pursuant to F.R. Civ. P. 60.48[3][b] such a circumstance does exist when the litigant lacks any fault in not preventing the order from what the relief is sought, which explains in full the litigant's circumstances in the instant case.

Accordingly the Doctor respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO: 01-4315

TAWOOS BAZARGANI,

Appellant,

v.

HAVERFORD STATE HOSPITAL;
AIDAN ALTENOR, Ph.D., Superintendent-Haverford State Hospital; MIA MARCOVICI, M.D., Assistant Superintendent-Haverford State Hospital

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On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 94-cv-7071)
District Judge: Honorable Harvey Bartle, III

Submitted Under Third Circuit LAR 34.1(a)
June 25, 2002

Before: ALITO, ROTH and FUENTES, Circuit Judges

(Filed: November 7, 2002)

OPINION

PER CURIAM

Dr. Tawoos Bazargani appeals *pro se* the District Court's order denying her motion for relief made pursuant

to Federal Rule of Civil Procedure 60(b). We review the denial of a Rule 60(b) motion for an abuse of discretion. *See Coltec Indus. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002).

On November 21, 1994, Bazargani filed an employment discrimination action against Haverford State Hospital ("Haverford") in the United States District Court for the Eastern District of Pennsylvania. At the request of Bazargani's counsel, the action was dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) by the District Court on September 29, 1995. More than six years later, on October 25, 2001, Bazargani filed a motion to reopen in the District Court.[1] The District Court denied Bazargani's motion on November 5, 2001, concluding that Bazargani failed to establish that she was entitled to relief from the September 29, 1995 order. Because the District Court did not abuse its discretion in denying Bazargani's motion, we will affirm.

"The general purpose of Rule 60(b), which provides for relief from judgments for various reasons, is to strike the proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Bougher v. Secretary of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978). On appeal, Bazargani argues that she is entitled to either Rule 60(b)(4) or (6)

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[1] In the meantime, Bazargani was unsuccessfully litigating claims against Haverford in both Pennsylvania state court and federal court. *See Bazargani v. State Civil Serv. Comm'n*, 711 A.2d 529 (Pa. Cmmw. 1998), *allocatur denied*, 732 A.2d 1211 (Pa. 1998); *Bazargani v. Haverford State Hospital*, 90 F.Supp.2d 643 (E.D. Pa. 2000), *aff'd per curiam*, C.A. No. 00-1390, April 12, 2002.

relief from the September 29, 1995 order because Haverford committed "fraud on the court."

Rule 60(b)(4) provides that a party may be relieved from a final judgment or order when the judgment is void. *See* Fed. R. Civ. Pro. 60(b)(4). An order or judgment may be void, and therefore subject to relief under Rule 60(b)(4), "if the court that rendered it lacked jurisdiction of the subject matter or the parties or entered 'a decree which is not within powers granted to it by the law.'" *Marshall v. Board of Educ.*, 575 F.2d 417, 422 (3d Cir. 1978) (quoting *United States v. Walker*, 109 U.S. 258, 265-67 (1883)). No passage of time can render a void judgment valid; therefore, there is no time limitation on bringing a Rule 60(b)(4) motion. *See United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000) (en banc). However, none of Bazargani's allegations establish that the September 1995 order was in any way void. To the contrary, the District Court had jurisdiction over the subject matter (employment discrimination), as well as the parties (a Pennsylvania resident and an institution which was operated by the Pennsylvania Department of Welfare), and there is absolutely no indication that the District Court "entered 'a decree which [was] not within powers granted to it by the law.'" *Id.* In addition, Bazargani's allegations of perjury and misconduct by an officer of the court by Haverford and its attorneys are utterly unsubstantiated.

Rule 60(b)(6) provides that a party may be relieved from a final judgment or order for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. Pro. 60(b)(6). However, a motion made pursuant to Rule 60(b)(6), the "catch all" provision of Rule 60, must be made within a reasonable time. Under the circumstances

presented here, six years is simply not a reasonable amount of time. Moreover, relief under Rule 60(b)(6) "may only be granted under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir. 1993). Bazargani has failed to show such "extraordinary circumstances." *Id.*

Accordingly, we will affirm for the reasons articulated herein and by the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DR. TAWOOS BAZARGANI	:	CIVIL ACTION
v.	:	
HAVERFORD STATE HOSPITAL, et al.	:	NO. 94-7071

ORDER

AND NOW, this 5th day of November, 2001, it is hereby ORDERED that the motion of plaintiff to reopen the case is DENIED.

Plaintiff filed this employment discrimination action on November 21, 1994. Prior to jury selection on September 28, 1995, and at the request of plaintiff's counsel, the court dismissed this action without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. Plaintiff, acting pro se, filed this pending motion to reopen over six years later, on October 24, 2001. Plaintiff relies on Rule 60(b)(4) and Rule 60(b)(6). She contends that defendant's discriminatory conduct has continued after the 1995 voluntary dismissal of the action and that her counsel did not advise her of the dismissal until 2001.

Where there is mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud, Rule 60 requires any motion to retrieve a party from the operation of a final judgment or order to be made no later than one year after it was entered. *See* Fed. R. Civ. P. 60(b)(1), (2), and (3). Seeking to avoid this limitation, plaintiff claims the judgment is void under Rule 60(b)(4).

She also cites the catch-all of Rule 60(b)(6) which permits the court to relieve a party from a judgment for "any other reason justifying relief from operation of the judgment." Under Rule 60(b)(4) and Rule 60(b)(6), the motion must be made within a reasonable time.

Plaintiff's motion contains nothing which persuades the court that a delay of more than six years is reasonable under the circumstances. Accordingly, the motion to reopen is being denied.

BY THE COURT:

/s/ Harvey Bartle
J.

APPENDIX C

§ 510.24 Departure From Usual Course of Judicial Proceedings

[1] – Court's Power of Supervision

[a] – Exercise of Court's Supervisory Power

In ruling on a petition for certiorari, the Court may consider whether "a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

This old and well-established provision goes back to the Revised Supreme Court Rules of 1925 (*see* §§ 510App.01[1], 510App.101). It appropriately reflects the Supreme Court's position at the apex of the federal judicial system.

[b] – Court's Supervisory Tasks

[i] – Assuring That Circuit Courts Remain Within Accepted Boundaries

Besides its duty to decide cases within its original and appellate jurisdictions, the Court is vested with various supervisory tasks. It promulgates rules of practice and procedure for the lower federal courts, and through the Judicial Conference of the United States, monitors the operations of federal courts and makes recommendations for improvement of these operations.

Supreme Court Rule 10 recognizes an additional responsibility – to ensure that the circuit courts stay within the boundaries of "the accepted and usual course of judicial proceedings." If a circuit court has strayed too far

from this course, the Supreme Court may grant certiorari to correct the situation. And this is true whether the circuit court itself has overstepped the boundaries of accepted procedure, or has "sanctioned such a departure by a lower court."

[ii] – Issuance of Writ of Mandamus

The Court's power to issue a writ of mandamus may overlap its authority to grant certiorari when the Court is acting in a supervisory capacity. In one case certiorari was granted to review a removed case that the district court had remanded to the state court. The district court's sole ground for remand was that its over-burdened docket would unjustly delay going to trial. The Supreme Court reversed, noting that "[t]here is nothing in our later cases dealing with the extraordinary writs that leads us to question the availability of mandamus in circumstances where the district court has refused to adjudicate a case, and has remanded it on grounds not authorized by the removal statutes." But mandamus is an extraordinary remedy, and Supreme Court Rule 10 permits the Court to grant certiorari to remedy conduct that would not merit use of the extraordinary writ of mandamus.

* * *

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§ 60.21[4][b]

[b] – Misconduct by Officer of Court Is Persuasive Factor in Fraud on Court

One of the distinguishing facts in the leading *Hazel-Atlas* case was the participation of a lawyer for one of the party's in the creation as well as the presentation of the

fraudulent evidence relied on by the Patent Office and the Third Circuit. As a result, subsequent courts have stated that the participation of an officer of the court in the fraud is either an essential element of fraud on the court contributing to the subversion of the adjudication process or an alternative basis for finding fraud on court.

The Sixth Circuit has quoted, with approval, a definition of fraud on the court that consists of five elements: (1) conduct on the part of an officer of the court; (2) that is directed to the "judicial machinery" itself; (3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard for truth or falsity; (4) that is a positive averment or is a concealment when one is under a duty to disclose; and (5) that deceives the court. Thus misconduct of an officer of the court is an essential element of fraud on the court; but there is fraud on the court only if this misconduct precludes proper adjudication by the court.

The Ninth Circuit apparently treats misconduct by an officer of the court as an alternative basis for finding fraud on the court; an alternative to the definition involving subversion of the adjudication process, as discussed in [a], above. The Ninth Circuit has quoted Moore's for the proposition that fraud on the court is a "species of fraud which does or attempts to, defile the court itself *or* is a fraud perpetrated by officers of the court" (emphasis added). In the case that prompted the definition just quoted, the Ninth Circuit was dealing with a bankruptcy sale that was confirmed on the basis of a perjured affidavit by the debtor-in-possession. The Ninth Circuit refused to follow the normal rule that presentation of perjured testimony is simply fraud between the parties and not fraud on the court (*See* [c], *below*). The court ruled in this case that because a debtor-in-possession was an officer of

the court, his perjury was different from that of an ordinary party or witness and amounted to fraud on the court. The Fourth Circuit has agreed:

* * *

[g] – No Time Limit or Laches Applies to Relief Based on Fraud on Court

Because fraud on the court concerns the integrity of the judicial process itself, a judgment may be set aside for fraud on the court at any time. There is no time limit on any party or court. After all, in the leading *Hazel-Atlas* case, the United States Supreme Court acted in 1944 to tell the Third Circuit that it should set aside its 1932 judgment because it was procured by fraud on the court.

Many cases also imply that laches is not a defense to an action to set aside a judgment procured by fraud on the court. Technically, this is undoubtedly correct. A judgment procured by fraud on the court should not be allowed to stand solely because someone was not diligent in bringing the fraud to the court's notice. On the other hand, in practice, courts will likely consider the delays involved in determining whether the fraud in question is of the magnitude to constitute fraud on the court. The greater the delay, the more deference the court is likely to give to the concept of the finality of judgments. As one court noted:

> As to actions for relief from fraud on the court it is generally held that the doctrine of laches as such does not apply, but unexplained delays bear on the basic concept of the finality of judgments and the proof.

* * *

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§ 60.22[2]

[2] – Discretion Must Be Exercised Reasonably, According to Accepted Principles

The fact that the court has broad discretion in determining a Rule 60(b) motion (*see* [1], *above*) does not mean that there are no limits on the court's actions when confronted with a Rule 60(b) motion. "The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles." The "accepted legal principles" that govern the exercise of discretion include:

- The principle that finality of judgments is of great importance and that final judgments should not be disturbed lightly.
- Rule 60(b) is not a substitute for a timely appeal. Courts should not grant relief when the moving party has not been diligent in protecting its own rights by filing an appeal from an adverse judgment.
- Rule 60(b) permits relief only when the moving party acts within a "reasonable" time (*see* § 60.65[1]). As noted above, courts have discretion to determine whether the moving party acted within a "reasonable" time (*see* [1], *above*) in addition to determining whether the moving party acted within any fixed time set by the rule (*see* § 60.65[2]).
- The law favors giving parties a hearing on the merits of claims, so that a court may be more favorably inclined to grant a motion in a case in which the moving party has defaulted than in cases already determined on

their merits. This principle is explored at [3], below.

- The law disfavors meritless litigation, so that, even in the case of a default judgment, a court may properly insist that the moving party establish a meritorious claim or defense in order to secure relief. This principle is explored at § 60.24.

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§ 60.29[3]

[3] – Relief Favored When Judgment Has Resulted From Default

[a] – Judgment on Merits Is Preferred

When a party seeks relief from a default judgment in a timely manner (*see* § 60.65), and if a party has a meritorious claim or defense (*see* § 60.24), a court should resolve all doubts in favor of granting relief so that the matter may be determined on its merits. Although a motion for relief from a judgment is committed to the sound discretion of the trial court, a trial court's abuse of discretion in refusing relief does not have to be glaring in order to justify a reversal by an appellate court in the case of a default judgment.

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18 U.S.C.A.

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of

perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

* * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Penn Consolidated Statutes Annotated
18 Pa. C.S.A.

§ 4094. Unsworn falsification to authorities

(a) In general. – A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

(1) makes any written false statement which he does not believe to be true;

(2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(b) Statements "under penalty." – A person commits a misdemeanor of the third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

* * *

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§ 41.33[6][e]

[e] – Dismissal by Notice Without Prejudice Deprives Court of Jurisdiction to Consider Merits of Action or Issue Further Orders

Once a notice of dismissal without prejudice is filed, the court loses jurisdiction over the case, and may not address the merits of action or issue further orders. The court may not rule on a pending motion to dismiss, and any decision addressing the merits of such a motion is a nullity. Nor may the court issue any other order resolving the merits of the action. A subsequent order directing that the dismissal be "with prejudice" instead of "without prejudice" is improper.

A court order dismissing an action "without prejudice" following a dismissal by notice is superfluous. . . .

[g] – Orders Issued During Pendency of Action Nullified

Orders issued during the pendency of an action which is dismissed by notice are rendered void and have no collateral estoppel effect in later litigation.

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§ 41.34[2]

[2] – Parties' Right to Dismiss by Stipulation Absolute

Subject to the specific provisions of other rules or statutes (*see* §§ 41.31-41.32) the parties' right to terminate the action by stipulation is absolute. Thus, a voluntary stipulation under Rule 41(a)(1)(ii) does not require court approval. However, there is some authority that the court has the inherent power to look behind a stipulation to determine whether collusion or improper conduct gave rise to the dismissal, at least in cases involving the public interest.

A stipulation of dismissal must be voluntary, and a court cannot order a party to execute a stipulation of dismissal even if the other party claims that the parties agreed to settle the matter.

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§ 41.34[3]

[3] – Court May Not Impose Conditions Upon Stipulation

Because the parties' right to a stipulated dismissal is absolute (*see* [2], *above*), the court may not impose conditions on the stipulation.

§ 41.34[6][g]

[g] – Stipulated Dismissal Without Prejudice Deprives Court of Jurisdiction to Consider Merits of Action or to Issue Further Orders

Further orders of the court following the filing of the stipulation are either superfluous or prohibited. The court lacks jurisdiction to enter further orders, and any orders entered are of no effect. The court may not reach the merits of the action, such as granting summary judgment on the claims that are the subject of the stipulation. An unconditional dismissal by stipulation terminates the district court's jurisdiction, except for the limited purpose of reopening and setting aside the judgment within the scope of Rule 60(b).

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4. DISMISSAL BY ORDER OF COURT

§ 41.40 Voluntary Dismissal by Court Order

[1] – Nature and Purpose of Rule

Rule 41(a)(2) permits the plaintiff to seek a voluntary dismissal by court order if such a dismissal is no longer available as of right under Rule 41(a)(1)(i) (*see* § 41.33) and the plaintiff cannot secure consent to a stipulated dismissal under Rule 41(a)(1)(ii) (*see* § 41.34). The purpose of Rule 41(a)(2) is to permit the plaintiff to dismiss the action while avoiding prejudice to the defendant through the imposition of curative conditions. In exercising its discretion (*see* [2], *below*)

* * *

[§]60.44[4]

[4] – Judgment May Be Void for Violation of Due Process by Rendering Court

It has been repeatedly stated that "a judgment is void for purposes of Rule 60(b)(4) . . . if the judgment was entered in violation of due process." In fact, most of these cases are cases dealing with failure to serve a defendant with process or give adequate notice to class members, so that the reference to lack of due process does not mean anything more than the lack of personal jurisdiction, matters that are discussed in [3], above.

There are, however, forms of denial of due process other than lack of personal jurisdiction. For example, if a prisoner brings a habeas corpus petition, there is no question that the court has personal jurisdiction over the prisoner. If the court proceeds to hear the habeas corpus petition and find facts without notice to the prisoner sufficient to permit any meaningful participation by the prisoner, the resulting judgment on the petition may be void and may be set aside under Rule 60(b)(4). There is no theoretical limit to the possibilities that a judgment could be void because a court with jurisdiction over the subject matter and jurisdiction over the parties nonetheless "has acted in a manner inconsistent with due process of law." One court, for example, reversed a denial of a Rule 60(b) motion for relief from a void judgment when it found that a judgment in question compelling arbitration was issued in direct contravention of statute that entitled the moving party to an evidentiary trial. In another case, a consent judgment based on a settlement of a minor's claim was void because the minor's guardian had not obtained advance approval of the settlement from a state court;

applicable state law provided that such an unapproved settlement was a nullity.

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§ 60.44[5][c]

[c] – No Real Time Limit on Relief

As is noted elsewhere (*see* § 60.65[1]), Rule 60(b) states that a motion for relief from a judgment brought under Rule 60(b) must be brought within a "reasonable" time. Despite the express language of the Rule, there is no real time limit of any kind on a motion for relief from a judgment. A motion under Rule 60(b)(4) challenging a judgment as void is subject neither to the "reasonable" time requirement or Rule 60(b) nor subject to the equitable doctrine of laches, but rather may be made at any time.

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§ 60.48[3][b]

[b] – "Extraordinary Circumstances" Usually Means Lack of Fault by Movant

The main distinction between *Klapprott* and *Ackermann* is that Mr. Klapprott was a victim of circumstances while Mr. Ackermann was largely at fault for his predicament (*see* [a], *above*). The cases seem to make that fault/no fault distinction the controlling factor in determining whether extraordinary circumstances will be found or not. In a vast majority of the cases finding that extraordinary circumstances do exist so as to justify relief, the movant is completely without fault for his or her predicament; that

is, the movant was almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought. For example:

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§ 60.48[4][a]

[4] – Culpable Conduct by Party's Agents and Attorneys Might Support Relief

[a] – Relief Available When Agent Who Consents to Judgment Lacks Authority

There are a number of cases that permit relief from a judgment under Rule 60(b)(6) when the judgment was rendered because an agent or attorney without the power to bind the principal to a judgment nonetheless purports to consent to judgment:

- A judgment entered by confession may be set aside when the confession was made by an attorney-in-fact who lacked authority to make it.
- A consent judgment binding the State of Oregon to perpetual funding of prisoner legal assistance could be set aside when the state agents who consented to judgment lacked the authority to bind the state to this judgment.
- A stipulated judgment may be set aside if the attorney making the stipulation lacked authority from the client to do so. However, it should be noted that other cases have granted relief in such situations under Rule 60(b)(1).

* * *

[§]60.65[1]

[1] – All Rule 60(b) Motions Must Be Brought Within "Reasonable" Time

Rule 60(b) states that "[t]he motion shall be made within a reasonable time. . . . " There is only one exception to this rule, and that applies to judgments that are totally void. As was noted during the section discussing relief from void judgments under Rule 60(b), there is and can be no time limit on judicial relief from a judgment that is, in fact, already a nullity and always subject to direct and collateral attack (*see* § 60.44[5][c]). Anytime is a "reasonable" time to set aside a void judgment.

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